Fundamental Rights of the Individual: An Analysis of *Ḥaqq* (Right) in Islamic Law

Mohammad H. Kamali

Despite the ubiquitous occurrence of the word *ḥaqq* in the works of classical jurists, a precise definition has never been articulated. Earlier religious scholars have relied on its literal meaning, while modern scholars have tried to provide a comprehensive definition. This essay looks into the definition of *ḥaqq* and ascertains, on a selective basis, some aspects that have engendered controversy and debate. It also discusses the tendency in Islamic law to place greater emphasis on obligations than on rights. I have attempted to develop a perspective on this and have, in the meantime, addressed the suggestion by western commentators that the Shari'ah does not recognize rights, but only obligations.

The answers given are partly the outcome of my reflections based on nearly a decade of intermittent research on basic rights and liberties in Islamic law. I have tried to advance an understanding of this basic and yet complex juridical issue and have related my analysis to the ongoing debate on the general subject of human rights. An adequate understanding of *ḥaqq* in Islamic law requires looking into sseveral related themes, and my attempt to do this has enabled me to identify the roots of what I regard to be a persistent misunderstanding of Islamic law on this subject.

Mohammad H. Kamali is a professor of law at the International Islamic University, Kuala Lumpur, Malaysia.

The author acknowledges the assistance of the Social Sciences and Humanities Research Council of Canada for a research grant in 1984 that facilitated his one year of research on "Fundamental Rights of the Individual in Islamic Law." The present essay has utilized much of the data collected during that period. This paper was presented in the Public Lecture Series of the Kulliyyah of Laws, International Islamic University, Kuala Lumpur,. Malaysia, 16 February 1993.

Western commentators generally hold that Islam does not recognize the idea of an individual having inherent rights, fundamental or otherwise. For Schacht (1970), "Islamic law is a system of duties, of ritual, legal and moral obligations, all of which are sanctioned by the authority of the same religious command." Gibb (1955) opines that "the Islamic theory of Government gives the citizen as such no place or function except as taxpayer and submissive subject." This line of argument is taken further by Siegman (1964), who states that "no such abstractions as individual rights could have existed in Islam . . . In such a system the individual cannot have rights and liberties . . . he has only the obligation."

Rights and duties in Islamic law originate in the Qur'an and the authentic Sunnah of the Prophet. The juristic manuals often speak of *ḥukm shar'ī*, a term that signifies a ruling, usually communicated in the form of a command or a prohibition, that regulates the conduct of a *mukallaf* (a legally responsible individual). Such a ruling may convey a variety of concepts, including legal rights and obligations. There may be an apparent propensity in the nature of such a communication, and in the language in which it is conveyed, towards obligations rather than rights. A closer examination, however, reveals that a mere propensity in the style of communication does not have a negative effect upon the substance and validity of rights in the Shari'ah. A real understanding and analysis of the language of the Qur'an and Sunnah confirm that Islam has its own view on this type of ruling and on its allied subjects of rights and duties.

In the Qur'an and the Sunnah, no formal distinction is made between fundamental and other rights, or between constitutional and ordinary law. This is also indicative of a certain outlook: in expounding the *juris corpus* of the law, the source materials of the Shari'ah reflect the unitarian influence of *tawḥīd* (unity in source and origin of all knowledge) and a tendency to stay away from approaches that may interfere with this principle's holistic and unitarian philosophy. As the Shari'ah adheres to the overriding authority of divine revelation, the sense of mission and duty to God and society acquires, admittedly, a certain prominence in the concept of *ḥukm* (hereinafter defined as ruling) over the idea, so to speak, of an individual's right or claim on God. The issue is essentially that of the pattern of relations between the Lawgiver and the recipient of law, one that is inspired by the ideals of unity and integration rather than the duality of their respective interests. Modern constitutional law, and constitutionalism as such, champions the rights of the citizen when dealing with the ever-expanding power of the state. This latter factor was, on the whole, viewed as a menace to individual rights and liberties.

Islamic law, on the other hand, does not proceed from a condition of conflict between the individual's respective rights and interests and those

of the state, for implementing the Shari'ah satisfies the basic purpose of the state's existence, which includes the rights of the individual. In doing so, both the individual and the state obey the Shari'ah and gain the pleasure of God. Thus the duality of interest often envisaged in modern constitutions does not present the same picture in the Islamic theory of government. Islamic law operates on the premise that God commanded humanity to act, or not to act, towards Him and other people in certain ways. The individual must worship and obey Him, as there is no room for anything other than submission to His will. However, God has expressed His will and decree and has thereby bestowed upon human beings certain rights as an expression of His grace. Commentators who deny the place and reality of rights in the Shari'ah have shown no awareness of this perspective and have advanced a superficial discourse that confuses a certain outlook maintained by Islam on rights and duties with the affirmative substance of the Shari'ah on this theme.

Over the centuries, Muslim jurists and scholars have spoken of the virtues of submitting to the will of God and obeying His decree and law. In spite of this, however, they have never hesitated to speak of the individual's rights as well as the safety and sanctity of his/her life and property. They were equally adamant in stating that the ultimate objective of the Shari'ah is to realize the interests and benefits of humanity. In other words, they do not doubt the centrality of individual rights to the whole concept of God's ruling. They were admittedly somewhat less elaborate in advancing theories concerning the definition and philosophy of law, but that was probably due, in part, to an attitude of piety and unquestioning submission to the will of God.

It seems that some commentators feel that this general outlook signifies a negation of the very idea of right. This bias in favor of obligation over right can be found in varying degrees in almost any legal system, and Islamic law is no exception, for obligation has a stronger foundation than right and carries a binding force that is lacking in the concept of right. But the reality, existence, and significance of right in Islamic law is undeniable; it is merely the form in which concepts are communicated, a certain view on the same reality, rather than a denial of that reality.

Meaning and Definition

Although the primary meaning of *ḥaqq* is "established fact" or "reality" (*al mawjūd al thābit*), in the field of law its dominant meaning is "truth" or "that which corresponds to facts." Both meanings are equally prominent, so much so that some lexicographers (Lane 1865) consider the second meaning to be the primary one. In the context of law, "right,"

"power," and "claim" signify other equally prominent meanings. Some writers add "beneficene and public good" (*al khayr wa al maṣlaḥah*) (Ḥammād 1987). And, lastly, *ḥaqq* means "law" as in "faculty of law" (*kullīyat al ḥuqūq*), which is synonymous with *kullīyat al qānūn*.

Ḥaqq occurs frequently in the Qur'an and is often used to imply certainty and proof of values, rewards, promises, and punishments. According to al Ṣābūnī (1972), there are at least six different Qur'anic usages of this term, but the general underlying concepts are certainty and proof (*al thubūt wa al wujūb*). In Qur'anic terminology, *ḥaqq* is interchangeable with duty (*wājib*). Although *ḥaqq* can mean a right as opposed to an obligation (Qur'an 51:19), the Qur'an does not distinguish either as the dominant meaning. Occasionally, *ḥaqq* denotes the Muslims' ultimate victory and salvation as a certain outcome (Qur'an 10:103; 30:47). In addition, it can mean in the cause of justice (*bi al ḥaqq*) and the truth (*al ḥaqq*) (Qur'an 2:42). These and similar usages lead al Bahīy (1973) to conclude that *ḥaqq* is inextricably linked with justice and benevolence (*'adl wa iḥsān*) and that they are the ultimate values sought wherever *ḥaqq* appears in the Qur'an.

And finally, *ḥaqq* is sometimes used with the intention of encouraging a certain course of conduct. In a hadith recorded by Muslim, Abū Hurayrah narrated that "a Muslim has a right (*ḥaqq*) over other Muslims in six matters . . ." (i.e., to return his/her greeting, accept his/her invitation, give sincere advice, etc.), all of which are moral rights. In order to emphasize their observance, however, they are referred to as *ḥaqq*. This would also serve as an example of the concept of moral, as opposed to legal, rights in Islam.

Classical jurists did not articulate a juridical definition for *ḥaqq*, but rather relied on its linguistic meaning (al Zarqā 1967).[1] They may have done so, as al Khafīf (1945) opines, because the word is clear and versatile and because its juridical usage often comes close to its literal meaning. A somewhat vague definition appears in Ibn Nujaym's *Baḥr al Rā'iq*, where it is defined as "the entitlement of a person to a thing" (*al ḥaqq mā yastaḥiqquhu al rajul*). Ibn Nujaym, however, gave an accurate definition of the right of ownership: "an exclusive assignment" (*ikhtiṣāṣ ḥājiz*) (Ibn Nujaym [d. 970 AH] 1894; *al Mawsū'ah al Fiqhīyah* 1989).[2]

An exclusive claim or assignment in favor of the right-bearer is a basic ingredient of the general concept of *ḥaqq*, and it is in this respect

---

[1]The tendency to rely on the literal meaning is also seen in *al Mawsū'ah al Fiqhīyah* (1989) where the article on *ḥaqq* (vol. 18) does not even contain a definition of this term.

[2] This definition is also quoted by *al Mawsu'ah al Fiqhīyah* (1989).

distinguished from permissibility (*ibāḥah*). The right of ownership is a typical example of *ḥaqq* as an exclusive assignment. Freedom of movement, on the other hand, may be given as an example of *ḥaqq* in the sense of permissibility, as it is an advantage to which people are generally entitled. As a result, no exclusive claim is established in favor of anyone in particular (al Dārinī 1984).

Langarudi (1991) states that in contrast to Sunni jurisprudence, Shi'i fiqh advocates the following definition: "*Haqq* is a power, whether material or spiritual, that the law has granted to a person over another person, over property, or over both."[3] He says further that every right must have at least one of the following three attributes: a) It can be waived (*isqāṭ*) by the right-bearer; b) it can be transferred to another party; and (3) it can be inherited, even without the expressed will of the right-bearer (ibid.).

Other scholars have provided the following definitions. Mūsā (1954) defines *ḥaqq* as "a benefit (*maṣlaḥah*) which the Lawgiver has granted to the individual, or the community, or both." Two points stand out in this definition and both are questionable: the equation between right and benefit and the fact that *ḥaqq* is not a goal in itself but rather a means to a certain benefit that it serves to obtain. For al Khafīf (1945), *ḥaqq* is "what is proven by the Shari'ah for the benefit of man." This definition considers *maṣlaḥah* to be the ultimate goal of *ḥaqq* but, unlike the previous definition, does not equate the latter with the former. However, this definition also suffers from certain weaknesses, one of which is that only a real person, as opposed to a corporate personality, can have a right. Moreover, it precludes rights that are for the benefit of other parties and not of the right-bearer as such (i.e., the right of guardianship, which is proven for the guardian but contemplates the benefit of the ward [al Darīnī 1984]). According to Abū Sinnah (1971), *ḥaqq* is "that which is established in the Shari'ah (*huwa mā thabata fī al shar'*) for a human being, or for Allah, over someone else." This definition also precludes the possibility of a corporate (*ḥukmī*) person possessing a *ḥaqq*.

All of these definitions recognize four essential requirements of *ḥaqq*:

1. It is something proven or established by the authority of Shari'ah: tangible goods (*'ayn*), usufruct (*manfa'ah*), a particular act (i.e., the right to delivery of goods bought), a certain forbearance to which the right relates (i.e., a neigbor's right not to be annoyed), a concept or

[3]The author refers to al Ṭabāṭabā'ī's *Bulghat al Faqīh* (p. 3) and to al Na'īnī's *Munyat al Ṭālib* (vol. 1, p. 41).

attribute (i.e., consultation in government affairs), or guardianship over minors.

2. The right-bearer (*ṣāḥib al ḥaqq*) may be an individual or God. As noted earlier, some of these definitions do not envisage any rights for a corporate personality (i.e., an entity having a common interest [*maṣlaḥah mushtarakah*] and financial capacity [*dhimmah mālīyah*]). Another distinction is that a corporate personality has a collective or common interest that is separate from and unable to merge into a private or individual interest. The corporate person must have the capacity to incur financial liability and rights. Examples of the corporate person are the state, a charitable foundation (*waqf*), and the national treasury (*bayt al māl*). The latter meets both of the above conditions, for it manifests the common interests of the community and, in this connection, incurs such rights as receiving the estate of a person who died without leaving a legal heir, becoming a party to disputes, and incurring financial liability (i.e., the remuneration of tax collectors).

3. The *mukallaf* (legally responsible person) to whom the *ḥaqq* applies is bound by a duty to respect it. Examples of this are the wife's right to maintenance by her husband and the community's recognition of the owner's right over his/her property.

4. For a right to exist, there must be affirmative permission (*idhn*) in the Shari'ah or, failing that, there must be no prohibition against it.

All of these requirements must be met simultaneously for a *ḥaqq* to be recognized as such (ibid.; *al Mawsū'ah al Fiqhīyah* 1989).

As defined by al Darīnī (1984), *ḥaqq* is "an exclusive appropriation or power over something, or a demand addressed to another party which the Shari'ah has validated in order to realize a certain benefit." This definition's use of the term "exclusive appropriation" (*ikhtiṣāṣ*) precludes all that is merely permissible (*mubāḥāt*). A right must also be validated by the Shari'ah, which precludes a mere factual—but invalid—appropriation (i.e., a thief's possession of stolen items). A right may be exclusive to God or a human being, to real persons or corporate persons. This definition further views a right as the means to a benefit. In other words, they are not identical. For example, a right-bearer entitled to conclude a contract of sale may not use the right to earn interest (*ribā*) or to harm another person or the community by hoarding (*iḥtikār*), for both practices are forbidden. The benefit pursued by *ḥaqq* is thus distinguishable from *ḥaqq* itself and can be identified separately. It is a benefit (*maṣlaḥah*)

only when it consists of an exclusive assignment, for, objectively speaking, a benefit unrelated to anyone in particular is not *ḥaqq*.

Nevertheless, it seems that *ḥaqq* in Islamic law is essentially goal-oriented (*ghā'īyah*) and normally contemplates a benefit (*maṣlaḥah*). For example, if it is used in a way that violates the benefit upon which it is predicated, the right has been abused. According to al Shāṭibī ([d. 790 AH] n.d.), "the acts that the Shari'ah validates are not the goals in themselves, but the means to certain other objectives. These are the benefits (*maṣālih*) in whose pursuit the acts have been validated in the first place." Thus in spite of the fact that rights and benefits are essentially individualist concepts, they are ultimately subservient to a set of higher values. In the case of justice (*'adl*), which is viewed as a principal benefit, there is the possibility that following a Shari'ah-oriented policy (*siyāsah shar'īyah*) could result in cases where justice under the law might not be consonant with the greater benefit or interest.[4] The Shari'ah, revealed to the Prophet as a mercy and a benefit to humanity, has as its ultimate goal the benefit and interest of that same humanity. According to al 'Āmidī ([d. 631 AH] 1982), the jurists have reached consensus (*ijmā'*) on this point. Furthermore, reason also leads one to the same conclusion.

Power (*sulṭah*) established by virtue of *ḥaqq* may be over a person (i.e., custody of a person or a child) or an object (i.e., a legal heir's right to a share of his dead relative's estate). Due to the overriding influence of benefit on *ḥaqq*, the right-bearer does not have unlimited power in exercising his/her right. The right to life, for example, is sacrosanct and may not be subjected to aggression by others or by oneself. Similarly, a property owner may not destroy his/her property for no useful purpose, as this would violate the basic objective of God and the benefit upon which it is founded.

The norm in the Shari'ah is that rights and obligations do not exist unless there is evidence to suggest otherwise. Such a norm is termed "original absence of liability" (*barā'at al dhimmah al aṣlīyah*), by which is meant a presumption that can only be overruled by positive evidence. The only exception to its application noted here appears in the case of those natural rights (*al ḥuqūq al fiṭrīyah*) that come into being without

---

[4]It is reported that during a public audience with his officials, 'Umar ibn al Khaṭṭāb heard a grievance against the governor of Egypt, who had flogged the defendant without cause. The claim was established and the caliph ordered just retaliation. At this point, one of the Companions observed that the retaliation so decreed might achieve retributive justice, but that it would not be in harmony with the considerations of good policy and the general interest to flog a governor in front of a large audience. 'Umar agreed, and the issue was settled through financial compensation.

legal cause: the rights to life, freedom, equality, and having a mother do not depend on any cause other than the mere fact of a person's birth. Hence no other evidence is needed to validate them (Abū Sinnah 1971; Ibn Nujaym [d. 970 AH] 1894).

The direct causes (*al asbāb al mubāshirah*) of *ḥaqq* may be summarized as follows: Shari'ah rulings (*ḥukm shar'ī*); contract (*'aqd*); unilateral commitment (*iltizām*); inheritance (*wirāthah*); a lawful act (*al fi'l al mashrū'*) such as hunting, reclaiming barren land, or acting as a catalyst (*fuḍūlī*); and the violation of another's right (*al ta'addī 'alā ḥaqq al ghayr*), which may create a right to compensation on the part of the aggrieved party (Abū Sinnah 1971).

Ḥaqq and *Ḥukm*

The scholars of *uṣūl al fiqh* discuss *ḥaqq* and its varieties under the general subject of Shari'ah rulings (*ḥukm shar'ī*), a category that contains a broad variety of concepts, including commands, prohibitions, and permissions originating in the Qur'an and the Sunnah.

In *uṣūl al fiqh*, *ḥukm* is defined as a communication from the Lawgiver concerning the conduct of the *mukallaf* (legally competent person) and consisting of a demand (something obligatory [*wājib*] or prohibited [*ḥarām*]), an option (*takhyīr*), or an enactment (*waḍ'*) (*Al Mawsū'ah al Fiqhīyah* 1989; Ḥammād 1987).[5] This definition is broad enough to encompass and subsume *ḥaqq* in almost all of its varieties. A demand is usually communicated either as a command or a prohibition. When communicated in emphatic and decisive terms, the former is known as *wājib* and the latter as *ḥarām*. If the command is not utterly emphatic, the former is classified as recommended (*mandūb*) and the latter as reprehensible (*makrūh*). An option allows the individual to choose, and the resulting ruling is known as neutral (*mubāḥ*), as it is neither obligatory nor forbidden. An enactment is an objective exposition of a ruling's requirement(s) that enacts something as a cause, a condition, or a hindrance to something else. This ensures that the relevant Shari'ah ruling is applied properly: its cause (*'illah*) is present, all necessary conditions (*shurūṭ*) are fulfilled, and there is nothing to hinder its enforcement (Kamali 1991).

The fact that *ḥaqq* is usually subsumed under the general subject of Shari'ah rulings is significant insofar as it suggests that right, in Islamic law, originates directly or indirectly in clear Shari'ah injunctions (*Al*

[5]The *fuqahā'*, on the other hand, define *ḥukm* as a ruling arrived at by a *mujtahid* based on the evidence in the sources and general Shari'ah principles concerning the conduct of the *mukallaf* (Ḥammād 1987).

Mawsū'ah al Fiqhīyah 1989). Not all scholars agree with this statement. For example al Laknāwī, quoted in al Zarqā (1968), defines *ḥaqq* as an established ruling (*ḥukm yuthbit*), thereby ignoring a) the difference between cause and effect, b) the fact that a ruling is, by definition, a communication from God, and c) that the *ḥaqq* in question is the result of that particular communication and not the communication itself. The Shari'ah has also been used to validate contracts, wills, and agreements of legally competent persons, as well as to create rights and obligations.

As noted earlier, a ruling (*ḥukm*) has a wider scope than a right (*ḥaqq*), as the former is not confined to regulating relations among individuals (the main theme of the latter), but also regulates relations between an individual and God. This latter relation is often subsumed under the juristic concept of the right of God (*ḥaqq Allāh*). In reality, however, the right of God is more of a ruling than a right. It therefore seems that every right found in Islamic law is a ruling, but that not every ruling is necessarily a right. This can be seen in the case of an enactment that expounds upon a certain aspect of a *ḥukm taklīfī* (a ruling of commission) but may not create a right or an obligation (al Khafīf 1945; al Darīnī 1984). All Shari'ah rulings, as al Shāṭibī ([d. 790 AH] n.d.) points out, have a devotional (*ta'abbudī*) aspect, which means that no such ruling is totally devoid of God's right. Essentially the same idea is expressed by al Qarāfī ([d. 684 AD] n.d.), who states that there is no human right in total isolation of God's right.

Scholars of *uṣūl al fiqh* have discussed *ḥaqq*, in a more specific manner, under *maḥkūm fīh* (the subject matter of rulings). Here it is defined as the act or conduct of a *mukallaf* as specified by the relevant communication from the Lawgiver. To qualify as the subject of a ruling, the forbidden or obligatory conduct required must a) be identifiable, as opposed to vague or ambivalent, so that the person to whom it is addressed can ascertain what is required, b) be within his/her ability to perform (an impossible right or obligation cannot be demanded), and c) originate in an authoritative source: the recognized sources of the Shari'ah.

These same scholars have used the term *mukallaf* to refer to bearers of both rights and obligations (al Darīnī 1984). This term, as well as its other derivative, namely *taklīf*, incline towards the idea of obligation rather than right. Such usage may give the impression that *mukallaf* can only refer to the bearer of obligations. This would result in a specious conclusion, however, as *mukallaf* has been used to refer to bearers of both rights and obligations, for in both cases the individual is the recipient of a ruling.

The basic unity of right and duty in the case of a ruling can be seen in the definition of al Zarqā (1967) that defines *ḥaqq* "as an exclusive as-

signment established by the Shari'ah in the form of power (*sulṭah*) or commission (*taklīf*)." The author has evidently defined *ḥaqq* from the perspective of *ḥukm*, which is why the definition does not recognize a clear division between power and commission—*ḥaqq* can consist of either. A ruling of the Qur'an or the Sunnah may thus consist of communication that grants someone a certain power or conveys a demand (*taklīf*) in respect to a particular course of conduct. A ruling may consist of a power (when viewed from the vantage point of a right-bearer) or of an obligation (when viewed from the position of the party of incidence).

Islamic law seems to emphasize ruling rather than right. This might be because of its conveyed awareness of the relationship of all law to the Lawgiver. For example, one hadith states that "the blood, property and honor of a Muslim are forbidden to his/her fellow Muslim (Muslim here is interchangeable with human being)." Even though it apparently conveys a prohibition, it obviously speaks of the basic rights to life, personal dignity, and ownership, thereby endorsing numerous Qur'anic proclamations on the sanctity of these values.

If this type of discourse is compared with a modern constitution, it will be noticed that while the latter premises its basic rights on the interest of the right bearer, the Shari'ah tends to stress the rights and interests of others. A right comes from a ruling that, in turn, is communicated in such a way that the right-bearer is not its sole owner and agent—both God and the community have a stake in it. To say that this hadith creates only obligations is a one-sided interpretation, for it affirms rights to life and property for everyone while at the same time placing everyone under a corresponding obligation to respect the same rights for others. While a modern constitution states that such basic rights as life and the acquisition of property belong to everyone, the same ideas in an Islamic context would likely be conveyed with a slight difference of emphasis: the lives and properties of everyone are sacrosanct and cannot be violated. In both instances, the purpose is to create basic rights and corresponding obligations. The difference is perhaps in the former's emphasis on the individual and the latter's objectivity of basic values.

Some scholars of *uṣūl al fiqh*, for instance Ṣadr al Sharī'ah ([d. 774 AH] 1909), have spoken of such public rights as "freedom, honor, and ownership" (*al ḥurrīyah wa al 'iṣmah wa al mālikīyah*) as basic rights of every human being. Others consider the right of ownership as a basic right and an "exclusive appropriation" (*ikhtiṣāṣ ḥājiz*). Many rights in Islamic law fall into the category of so-called duty-oriented rights. Although Muslim jurists do not use this classification, the tendency in Islamic law to unify right and duty under the single concept of *ḥukm* and then seek a balanced orientation of both under the general concept of *'adl*

(justice) are indicative of an emphasis towards integration. For example, a father's right to discipline his child is, in reality, a duty combined with a certain measure of authority, as is a guardian's right to ensure that the prospective spouse is a suitable and equal match for his/her ward (*kafā'ah*) (al Darīnī 1984).

Varieties of *Ḥaqq*

Islamic law divides *maḥkūm fīh* (that which is related to rulings [*ḥukm*]) into two main categories: *ḥaqq Allāh* (the right of God or public rights) and *ḥaqq al 'abd* (the right of the individual or private rights). An individual's act or conduct can consist of the right of God, the right of the individual, or a combination of both. This latter right can be waived by the right-bearer, whereas the former cannot. As it is beneficial to the community at large, it is not amenable to waiver, reconciliation, or compromise. The right of God is, in other words, a public right and differs from the right of the individual in that its enforcement is a duty of the state. It is also a part of the general concept of *ḥisbah* (enjoining good and preventing evil) in the sense that anyone may demand its enforcement and adjudication in court, for it does not depend on instituting a particular claim. Enforcement of a private right is, on the other hand, up to the individual, who may or may not demand it. This distinction between rights, made by Muslim jurists at an early stage, had no parallel in Roman law (Ibn al Qayyim [d. 751 AH] n.d.; Abū Sinnah 1971; Langarudi 1991).

The ulema have subdivided these rights even further (Kamali 1991), which shows that, on the whole, Islamic law recognizes private rights as a prerogative of its bearer. With the exception of a few basic rights, as noted above, rights in general do not inhere in the person of their bearers, in the community's independent will, or in its government in total isolation from Shari'ah rulings. In essence this is the Ash'arī and the Akhbārī Shi'ah view, which asserts that rulings, rights, and obligations originate in Shari'ah alone. As a result, human reason cannot create basic values, rights, and obligations independently of the Shari'ah.[6]

Jurists have also elaborated a three-fold division of *ḥaqq* consisting of permissive (*al ḥaqq al mubāḥ*), imperfect (*al ḥaqq al thābit*), and per-

[6]The Mu'tazilah claimed that human reason provides a valid basis for rulings, whereas the Maṭuridīs adopted a middle position. The majority of ulema tend to subscribe to the former, whereas the Ḥanafīs favor the latter (Kamali 1991).

fect right (*al ḥaqq al mu'akkad*).[7] This division has been discussed mainly in the context of ownership, but its basic approach may be of wider applcation. In the case of permissive right, the right-bearer is entitled to act or not to act, for the law neither commands nor forbids him/her to do so. An example of this is the individual's right to own property. Until this right is exercised, it is considered a liberty. It only becomes a perfect right after the purchase or acquisition of an object or the receipt of it as a gift or an inheritance. An imperfect right falls between permissive and perfect rights and becomes operative when a person could acquire a perfect right through the exercise of his/her unilateral will. For instance, if a person has received an offer to buy an object, an imperfect right is created in his/her favor. If he/she purchases that object, the imperfect right turns into a perfect right that can be enforced by the Shari'ah.

Both permissive and imperfect rights are weak in the sense that they cannot be sold, inherited, or used to form the basis of a claim for compensation (*ḍamān*). The Mālikīs hold that imperfect rights are inheritable. Thus the legal heirs, according to Mālikī law, inherit their deceased relative's option of acceptance (*khiyār al qabūl*). A perfect right entitles the right-bearer to an exclusive advantage. A correlative obligation, which must be respected by the community, is also created as a result. A perfect right is inheritable and provides a valid basis for a claim to compensation (Ibn 'Ābidīn [d. 1252 AH] 1966; al Qarāfī [d. 684 AH] n.d.).

Ḥaqq can be subdivided further in terms of enforceability: religious-moral (*dīnī*) and juridical (*qaḍā'ī*). The former, although validated by the Shari'ah, cannot be proven or enforced by a court. To illustrate this, if someone possesses a piece of property for fifteen years (the Ḥanafīs and Mālikīs say ten years), ownership is established in his/her favor (*dhū al yad*). Thus while the real owner has the moral right and is the actual owner, the court cannot do anything about it. Similarly, if a debtor denies a creditor's right to repayment and the latter is unable to prove his/her case in court, the court cannot enforce the creditor's right. Most of the rights of God (i.e., *'ibādāt, kaffārāt*) are in this category. As no one is expected or authorized to demand their enforcement, they are basically unjusticiable, despite the fact that the judge is vested with discretionary powers (*ta'zīr*) to discipline those who seriously neglect them. Rights without a particular party as the right-bearer, such as a religious endowment (*waqf*) for the poor and the indigent, also fall into this category.

Juridical rights, on the other hand, are susceptible to proof at the behest of the right-bearer, and a Shari'ah court has the power to adjudicate

[7]For a similar classification of right in western law, see Curzon (1979).

them. Some examples of this right are the creditor's right to demand repayment from a debtor and a wife's right to maintenance by her husband (Abū Sinnah 1971; *al Mawsū'ah al Fiqhīyah* 1987).

Contrary to the asssertion of western commentators that the Shari'ah recognizes no separation between law and religion, there is evidently such a recognition as regards matters of *ḥaqq*. Legal rights and duties are identified and separated from their purely religious counterparts. A parallel separation is found in the more general concept of *ḥukm* (ruling), as the Shari'ah distinguishes between moral (recommendable [*mandūb*], reprehensible [*makrūh*], and permissible [*mubāḥ*]) and legal (obligatory [*wājib*] and forbidden [*ḥarām*]) categories. The central feature of this division is to clarify what is legally enforceable and what is only moral advice. The three elements in the moral category are considered advice, with *mubāḥ* being neutral and *mandūb* and *makrūh* serving as its subvarieties, and as such are not legally enforceable. The two elements in the legal category enjoy a much more limited scope of activity. Therefore, to describe the Shari'ah as a "religious law" or "a system of religious duties" and to assert that it recognizes no separation between law and religion is not in line with the technicalities of Islamic legal thought. The Shari'ah is in unison with religion in matters of belief, *'ibādāt,* and in commitment to basic values, yet it clearly recognizes a functional separation between law and religion on an extensive scale.

A Glance at the Qur'an

In the Qur'an, textual rulings (*aḥkām*) are generally addressed to individuals and the Muslim community. Both groups are commanded, persuaded, encouraged, discouraged, warned, and prohibited in a language that is versatile and not necessarily confined to the juristic style of a legal code. Qur'anic legal injunctions are normally in the form of commands and prohibitions. This is also the main area in which rights and obligations are created either directly or by indication. The other three categories of rulings, which are essentially nonlegal, may create moral rights and responsibilities that, in turn, may provide a basis for ijtihad and the subsequent development of a moral right or value into a legal right.

Qur'anic rulings occur in a variety of forms. For example, the ruling on the right to privacy consists of a definitive injunction: "O believers! Enter not houses other than your own until you have asked leave and saluted the inmates. If you find no one therein, do not enter until you are given permission" (Qur'an 24:27). Here a negative right is created in favor of the occupants of the house not to be disturbed by strangers. As they have exclusive right (i.e., ownership) to the house they occupy, they

can refuse permission to those seeking to enter. This right is known as an exclusive appropriation (*ikhtiṣāṣ ḥājiz*). The text thus creates a basic right to privacy within the framework of a prohibitive ruling. This ruling is also addressed to the community of believers, which might signify a certain orientation of the Islamic concept of right in that direction.

This Qur'anic ruling is further substantiated by its provisions concerning suspicion and espionage, which entail accessories or accessory rights, to the principal right of privacy: "O believers, avoid most of suspicion, for suspicion in some cases is sin . . . and spy not, nor backbite one another . . . surely Allah is Merciful (49:12)." The text conveys a decisive ruling on the illegality of espionage and gives a clear indication that only some forms of suspicion may be justified and tolerated. Espionage is a concrete activity that can be proven by evidence and is therefore a proper subject for a ruling, but suspicion is not. This is why the Qur'anic language leaves room for flexibility. Moreover, a reasonable suspicion based not on malice but on the prevention of criminal activity or evil may be permitted on a restrictive basis. The fact that the Qur'anic ruling on privacy and espionage occurs in the form of prohibition could be because it creates a negative right and also in order to add emphasis, for a prohibitive ruling is generally more emphatic than an affirmative command.

Furthermore, the Qur'anic proclamations that "We bestowed dignity on the progeny of Adam" (17:70) and "Kill not a soul which God has made sacrosanct save in the cause of justice" (17:33) embody the fundamental rights of an individual to life and personal dignity. We read further: "Whosoever killed a person . . . it shall be as if he had killed all mankind, and who so gave life to one, it shall be as if he had given life to all mankind" (5:30). The right to personal dignity is further substantiated by the Qur'anic prohibition of slanderous accusation (*qadhf*) (24:3) and "let not one people deride another people . . . and defame not your own people, nor call one another by (insulting) nick-names" (49:11).

On the right to work and lawful earning, the Qur'an says: "Men have a right to what they have earned and women are entitled to what they have earned" (4:32) and "O believers, spend of the lawful and pure substances you have earned and of the resources We have in store for you in the earth" (2:267). On the same subject, one reads: "and when the prayer is finished, disperse in the land and seek of God's bounty" (62:10). Worshipers are not to spend any more time in the mosque than required by the specified prayer; they are encouraged to work and earn a living.

The Qur'an and the Sunnah support the concept of private property: "And devour not each others' property wrongfully unless it be through lawful trade and your mutual consent" (4:29; see 2:188). Lawful trade, work, and transactions of mutual consent are thus recognized as principal

means of acquiring wealth. Wealth obtained through lawful means is not reprehensible. On the contrary, it maintains just the opposite: "Say! Who has forbidden the adornment of life which God has provided for His servants? Say they are for the believers in this life" (7:32).

The Qur'an validates freedom of movement, especially when used to preserve the integrity of one's faith and conscience (4:97; 8:72). Migration (*hijrah*) and travel in the cause of righteousness forms the theme of many Qur'anic passages and its merit is generally emphasized. In fact, all freedom of movement, regardless of its ultimate objective, is allowed: "He it is who has made the earth subservient to you, so travel in its tracts and benefit from its bounty" (67:15). The Qur'anic declaration that "there shall be no compulsion in religion" (2:256) is equally unequivocal on the normative validity of religious freedom in Islam.

Nowhere does the Qur'an provide a list of basic rights and liberties or formally distinguish such categories as fundamental and ordinary rights. The Qur'anic style of legislation sometimes results in the relevant text not being self-evident and explicit, as it may lay down only a broad principle rather than a concrete ruling. This is why it is often in need of interpretation and ijtihad.

Qur'anic concepts are also conveyed in the linguistic form of an injunction, while only imparting a recommendation or permission. The precise evaluation as to whether a specific linguistic command bears a juridical obligation, a recommendation, or a mere permission, or whether the text validates a right or an obligation having legal import, are determined by the text's language and the Shari'ah's general principles and goals.

A perusal of the Qur'an's legal contents (*aḥkām*) indicates that the text is not always categorical concerning the evaluation (i.e., obligatory, recommended, permissible, reprehensible, or forbidden) of its rulings. Only occasionally does it speak in terms of obligatory or forbidden, while the intermediate three categories are not specified as such, but are often understood from the language of the text or extraneous evidence. The scale of five values is basically a juristic construct of the *fuqahā'*, for one does not find categorical affirmation for it in the Qur'an and the Sunnah. Thus the categories are in many ways open-ended and subject to interpretation. Likewise, determining whether a ruling represents a right of God, a right of the individual, or a combination of both is often a matter of interpretation. One *mujtahid* may conclude that a certain right is a right of God, while another may be able to justify classifying it as a right of the individual. Their conclusions may also differ in the degree of emphasis assigned to one or the other of these rights.

Although the *fuqahā'* have spoken at length about the classification of rights, their expositions still leave room for research. For example,

how can this area be related to modern constitutional law? It is gratifying to note that some development has taken place. Individual authors, committees, and conferences have, in recent decades, attempted to produce a model constitution or bill of rights based on Islamic law (Azzam 1981). They have generally spoken in positive terms on virtually the entire range of basic rights. The fact, however, that direct government participation has been lacking in nearly all resulting proclamations has left the exercise largely theoretical and wanting as regards a general consensus.

Human Rights and Dignity

Human rights are a manifestation of human dignity and justice, as they are predicated on attaining these objectives. Rights may be proprietary or personal, utilitarian or moral, but they almost always relate to the dignity of the individual and his/her quest for a just social order. Constitutional proclamations of the rights of citizens are generally reflective of a society's commitment to the individual's dignity and value.

Such expressions, whether national charters or international declarations, are tainted with their proponents' cultural values and traditions. Like other cultural traditions, the West has maintained a certain human rights perspective that is not always representative of other cultures. The Universal Declaration of Human Rights, founded on the western and mainly liberal Protestant traditions, is regarded as less than universal, for it is biased in favor of western values. "It is a fact" as one author observed "that the present day formulation of Human Rights is the fruit of a very partial dialogue among the cultures of the world" (Panikkar 1982). Human rights are thus compared to a window through which a particular culture envisages a just order for its individuals.

Such a view becomes objectionable when espoused with a claim to exclusivity. The western view of human rights needs to acknowledge that there are and have to be a plurality of windows, visions, and perspectives concerning the substance of these rights. A traditional Confucian, for example, might see this issue of order and rights as a question of "good manners." The West itself stresses rights, while Islam values obligation. The western tradition posits freedom in order to avoid the outcome of despotism, while Islam emphasizes virtue and dignity through moral rectitude. "Nothing could be more important however" as Panikkar points out "than to underscore and defend the dignity of the human person" (ibid.).

To take dignity and justice as goals would enrich our approach to human rights, for the concept of right is essentially a narrow one that precludes some very important aspects related to an individual. For example, in the case of abortion, who has the right and who bears the obligation?

As regards the guardianship of a minor, is parenthood a right or a duty? Apart from the conceptual difficulties of maintaining the binary division between right and duty, the aggressive defense of individual rights may have negative or unjust repercussions on others, as rights are not necessarily an individual's concern and prerogative. The need for consensus in many traditions, instead of majority vote, is based precisely on the corporate nature of human rights.

In addition, there seems to be no consensus on the exact meaning of democracy as a political system. "No form of government," as Enayat has pointed out "can be entitled to the epithet democratic" without being predicated on several principles and values respected by its people, such as a sound recognition of the worth of all human beings, their equality before the law, and respect for law and order in society (Enayat 1982).

The Qur'anic declaration on an individual's dignity (17:70) is so vividly objective that it makes human dignity one of the Shari'ah's cardinal objectives. As a major Qur'anic theme, references to human dignity occur in a variety of contexts. The Qur'an elevates humanity to a rank higher than the angels and honors it by the trust of being appointed vicegerent (*khalīfah*) of God on earth (2:30-4). The angels were told to prostrate before Adam, the archetypal human being. This moral latitude of humanity is then complemented with a reference to the physical nobility of its origin: "Surely We have created man in the best mould" (95:5). Another passage (33:72) affirms humanity's competence and trustworthiness in the eyes of God. Furthermore, God has subjected "whatever is in the heavens and whatever in the earth" (45:13) to humanity. And lastly, one could hardly overestimate the Qur'an's emphasis on the sanctity of human life, as it equates the enormity of killing one innocent individual to the destruction and massacre of all humanity (5:32).

Such evidence in the Qur'an and elsewhere has led Quṭb (1954) and al Sibā'ī (1960) to conclude that dignity is a natural right belonging to every individual. An individual is not honored for personal attributes or status in society, or for racial or tribalist distinctions, but because he/she is a human being. As both authors say, dignity is therefore the absolute right of everyone.

Ḥaqq and *'Adl*

The Shari'ah tends to integrate right and obligation into the broad concepts of *ḥaqq* (right) and *ḥukm* (ruling). A balanced implementation of rights and duties is, in turn, governed by Qur'anic standards of justice, as *ḥaqq* is inextricably linked with *'adl* (justice) in the Qur'an. In fact, "justice" is one of the Qur'anic meanings of *ḥaqq*. Obviously, justice in

any legal system is concerned with the correct implementation of rights and duties. But the question here is over an organic integration of right and duty into justice, something unique to the Qur'an and thus distinguishing the Islamic unitarian approach from other legal systems.

As earlier stated, the Shari'ah does not seek to eliminate the distinction between rights and obligations or to emphasize their duality and division (the familiar pattern of a modern constitution). In the Qur'an, right and duty merge into justice so much so that they become, in principle, an extension of one another. It was noted earlier that *ḥukm* (ruling) subsumes both rights and obligations. The relationship between ruling and justice is also one of means and ends: a ruling is the means towards justice, while the fulfillment and realization of *ḥaqq* in its dual capacities of right and obligation is predicated upon justice. Islam thus seeks to establish justice by enforcing Shari'ah rulings which, in turn, is expected simultaneously to mean the proper fulfillment of rights and duties.

The Qur'an's pervasive emphasis on justice proves that it is both a cardinal Islamic objective and a major Qur'anic theme. To stress this, the Qur'an declares justice to be the ultimate goal of religion, prophethood, and divine revelation, the very core and essence of Islam itself: "We sent Our Messengers with clear signs and sent down with them the Book and the measure in order to establish justice among people" (57:25). The phrase "Our Messengers" suggests that justice has been the goal of all divinely revealed religious guidance throughout human history. The thrust of this emphasis is on objectivity and universality in its standards: "O believers! Stand out firmly for justice as witnesses to God, even if it be against yourselves, your parents and relatives and whether it be against the rich or poor" (4:135); "And let not the hatred of a people swerve you from the path of justice" (5:8); and "when you judge among people, you judge with justice" (4:58). The Qur'an also enjoins Muslims to be just towards non-Muslims, especially those who are not oppressors and who have not committed acts of aggression against them (60:8).[8]

---

[8]Zullah (1991) tried to ascertain a certain priority in the Islamic value and belief structure. If there were three such values of absolute priority, these would be *tawḥīd* (oneness of God), *risālah* (prophethood), and *'adl* (justice). He said that this scale's order of priority had been deliberated by himself, in his capacity as chief justice of Pakistan, and one of the other judges of the Pakistani supreme court. They agreed that as justice has such a high profile in the Qur'an, it should precede prophethood. Thus justice is a fundamental right of everyone

This view is found in Mu'tazilī theological doctrines. Their creedal formulation of the five principles (*uṣūl al khamsah*) placed justice after oneness: *tawḥīd* (oneness of God); *'adl* (justice); *al wa'd wa al wa'īd* (belief in future reward and punishment); *al manzilah bayn al manzilatayn* (belief in the intermediate phase between Islam and disbelief and, accordingly, between paradise and hell); and *ḥisbah* (commanding good and forbidding evil) (Abū Zahrah 1977). (cont.)

Qur'anic standards of justice transcend all discrimination. This high level of objectivity could hardly be sustained in a situation of bipolarity between right and obligation, for emphasizing one over the other would likely compromise the objectivity of justice. A comprehensive approach to justice requires rights and obligations to be integrated into the essence of justice. At present, many modern constitutions reflect a general acceptance of this binary division and a commitment, in varying degrees, to pursue one or the other. The Qur'an's unitarian approach is to view rights and obligations as naturally integral to justice while subsidiary to the essence of justice. Moreover, justice and right are not identical, for if they were, justice could be waived, like a personal a right, by one who had a claim to it. The Qur'anic view of justice is more objective than that and is conceptually free of the bias that a right might entail in favor of its bearer ('Imārah 1989).

Islam's approach to balancing the right of God and the right of the individual is objective in the sense that it seeks to protect the interests of both the individual and the community under the umbrella concept of justice. Contrary to the philosophical orientations of individualism, liberalism, and socialism, the Shari'ah does not seek to stress one over the other. The philosophy of Islam is justice, and this requires an integrated and unitarian approach towards rights and obligations (al Darīnī 1984).

Within the general framework of justice, the precise adjustment of rights and obligations in favor of one or the other may be open to other interests, for example considerations of public policy and public benefit (*maṣlaḥah*), insofar as they remain in harmony with the Qur'anic value framework. Stressing rights or obligations would thus be acceptable only if it would prove beneficial and reflective of an integrated approach to justice, greater refinement in ijtihad, and better accommodation of legitimate social aspirations.

In sum, rights and duties in Islam are unified in the concept of *ḥukm*. This unity, in turn, is reflected in the Qur'anic concept of justice and has as its origin the belief and philosophy of *tawḥīd*. Establishing a correct balance between rights and duties is a function of changing social conditions and their accommodation under the broad umbrella of ijtihad, which may advance fresh perspectives on the ideals of justice and promote efficiency in its administration.

(cont.) When we recognize the basic unity of purpose in *'adl, ḥukm, ḥaqq*, and *wājib*, there remains no objection to a functional distinction between rights and their division into various categories depending on the nature of a particular right and the weight and character of affirmative evidence found in its support.

Rights and Fundamental Rights

The origin of fundamental rights is traceable to seventeenth- and eighteenth-century European writers, particularly Locke's and Rousseau's works on natural law, and the economic theory of laissez-faire. Vague and imprecise notions of natural rights were transferred to the Americas by European immigrants, where they were refined and articulated in the American constitution and its subsequent amendments. American judges continued to expound upon and refine them. Their work then influenced the constitutions of various European states and Japan after both the First and the Second World War. In 1948, the General Assembly of the United Nations approved a list of about thirty human rights, which included the more important fundamental rights and liberties (Munir 1975).

The distinction between fundamental and other rights is subject to change in both content and attributes, for it reflects the values and outlook of a particular society at that particular stage in its historical and cultural development. In western jurisprudence, for example, Blackstone did not mention freedom of speech while discussing personal liberties, and the classic passage on freedom of the press occurs in his section on wrongs and libel. The nearest he came to mentioning free speech was in his "Right of Persons," when he mentioned the right to petition the king or the Houses of Parliament for redress of grievances (Barendt 1985).

In his classic study of the constitution, Dicey acknowledged that English law took little notice of such concepts as freedom of speech and liberty of the press. He thus wrote that "freedom of discussion is . . . in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written" (Dicey 1964). The implications of this for the publication of minority and unorthodox opinions were almost totally ignored.

Writers on modern constitutional law have identified several methods that can be used to distinguish fundamental rights from other rights. The most obvious one, in the context of western law and also perhaps in the constitutions of Muslim countries, is to refer to the constitution and ascertain whether the right in question is expressed and recorded as such. In countries where the constitution is unwritten, fundamental rights can still be identified by reference to the rules, conventions, and judicial precedents that may have identified certain rights as of primary importance to the legal system's structure and content.[9]

---

[9]For example, in English law the rights to vote and to issue a writ of *habeas corpus* are both fundamental rights "as a matter of practice and history," as they are necessary for the proper working of the constitution (Bridge et al. 1973).

To designate a right as fundamental often means that the court views it as politically essential to the existence of society or essential to individuals and their sense of dignity and self-respect. Thus there are two often overlapping types of fundamental rights: those based on human dignity and those based on social policy considerations. For example, we respect a person's right not to be killed, as well as to privacy and of speech, as a matter of principle. We respect rights designed to maintain political integrity, such as the freedom of assembly and press, as a matter of social policy. If a right is respected on principle it may be restricted only for very compelling reasons, whereas a right founded on social policy may be overridden or changed on grounds of social and political desirability. A certain ranking may be ascertained in each category: the right to life may have priority over privacy, or the right of a police officer to carry weapons may be seen as an ordinary social utility right when compared to the freedom of assembly and press. When rights in the first category conflict with those in the second, it seems proper that the court favor the former, for it would seem that social and political utility should not be bought at the price of respecting individuals (Murphy 1984).

A legal right may be called fundamental when it embodies, in legal form, an essentially moral right or value. Moral rights are often deemed fundamental when the underlying moral principle(s) are judged as fundamental principles of the moral system in question. Western jurisprudence has thus entertained different philosophical views (i.e., utilitarian, individualist, and the social contract theories of law) when trying to ascertain the law's basic value structure and what it may regard as fundamental to the system and therefore entitled to enjoy a greater order of priority.[10]

Most of these theories may have aspects in common with the influences that determine the Shari'ah's approach to evaluating rights. Muslim jurists have almost unanimously considered the public interest (*maṣlaḥah*) as an objective and a philosophy of the Shari'ah. The public interest is strongly utilitarian, notwithstanding the fact that in Islam it is subservient to a set of divinely ordained values.[11] Another commonality is rights founded in the fundamental principles of morality. The principal difference here, however, is that the Shari'ah subscribes to the overriding authority of divine revelation as the determinant of basic moral and legal values. A right is considered fundamental by the Shari'ah if it is founded in the clear injunctions and basic/primary principles of the Qur'an and the

[10]Bridge (1973) expounds upon the theories of Kant, Kelson, Hart, and Rawls on the philosophy of law.

[11]For a discussion of *maṣlaḥah*, see Kamali (1988).

Sunnah. Although it makes no categorical pronouncements that identify fundamental rights as a separate category, the Qur'an does contain a set of principles that is reiterated and upheld in the Sunnah and the consensus of scholars. As such, they are fundamental to Islam and its legal system. These tenets and principles tend to have an overriding influence and permeate almost every level and development of Islamic legal thought.

A formal distinction between fundamental and other rights in the Shari'ah can be made by referring to the Qur'an itself. Rights founded on clear Qur'anic injunctions (i.e., life, property, privacy, movement, justice, personal dignity, honor, equality before the law, and of parents over children) may be classified as fundamental legal rights. The Qur'an also expounds certain norms and principles that give the Shari'ah its distinctive identity and tend to have a great influence on its rules and doctrines. Thus such Qur'anic principles as *ḥisbah* (promoting good and preventing evil) *amānah* (trust), *istikhlāf* (vicegerency), and *ta'āwun* (cooperation) may well provide textual authority for identifying many fundamental rights, whether of the individual, the community, the environment or whether it be within or beyond a state's territorial boundaries.

The Qur'an contains principles substantiated by the Sunnah, such as the removal of hardship (*raf' al ḥaraj*). The Sunnah itself deals with many other themes in almost every area of the law. These may or may not directly embody a fundamental right, but may well provide authority for identifying a particular right as basic and fundamental. The Qur'an and the Sunnah further provide authority for each of the five essential values: life, religion, intellect, property, and lineage. Many of these norms and principles have been identified and articulated by Muslim jurists as legal maxims (*qawā'id kullīyah*) that express the Shari'ah's objectives on an impressive variety of themes. These maxims could be used as guidelines for an Islamic theory of fundamental rights.[12]

In his study of human rights and fundamental freedoms in the Arab Middle East, Luca (1975) concluded that "the Koranic text has a stronger hold on the mind of the Arabs than declarations contained in their formal constitutions." It would be no exaggeration to project the substance of this statement onto other Muslim countries and then to proceed on the assumption that the Qur'an has a profound influence on the thoughts and conduct of all Muslims. The Qur'an can best be characterized as a stable source of authority and influence that is partly open to interpretation, but

[12]Some effort has already been made by individuals and organizations, such as the ulema of Egypt and Pakistan and the Islamic Council of Europe, but there is scope for further research to enhance both the range and value identification of fundamental rights in the Shari'ah.

having definitive injunctions and a basic value structure that cannot be altered. This continuity of values is the dominant feature of the Qur'an. It then follows that the basic concept of fundamental rights and their identification in the Qur'an and Sunnah are acceptable and recommended, insofar as this articulates the essentials of the Shari'ah in this area. It also gives them a concrete expression that could be used as a basic indicator of the place of a particular right, norm, or principle in the general framework of Qur'anic values.

As for considerations of public interest, the ulema have devised a three-fold classification: essential (*ḍarūrīyāt*), complementary (*ḥājīyāt*), and desirable (*taḥsīnīyāt*) interests. Essential public interests are defined as those that are essential to life and in the absence of which the normal social order would collapse. These interests are life, religion, intellect, property, and lineage. A minority opinion adds a sixth one—dignity (*'irḍ*)—which the majority opinion subsumes under "life." These must be protected at all cost, as a society cannot afford to expose them to danger and collapse. To protect them, and to promote and develop them further, is a basic duty of government in Islam. Next in this order comes the complementary interests, which are followed by the desirable interests and embellishments. These categories are often interrelated, open to value judgment, and tend to vary in reference to the circumstances in which they are evaluated. For example, a complementary interest in one setting may well belong to a higher or a lower class of interests in another. The means and methods of protecting these essential values may differ according to circumstances, but their basic structure is not changeable.

Some writers have drawn a parallel between the essential interests (*al maṣāliḥ al ḍarūrīyah*) of Islamic law and fundamental rights (*al ḥuqūq al aṣlīyah*) of modern constitutional law. 'Imārah (1989) makes perhaps the most explicit attempt. He is inclined to equate the idea of necessity with that of essential rights and to suggest that the recognition of a basic value structure in the Shari'ah would justify all measures designed to protect these values and facilitate their proper development. There is thus no objection to terminology or classification, for regardless of their designation, the Shari'ah advocates them and validates their protection.

This is a slightly different perspective than the majority scholarly opinion. The general approach is to ascertain the place and validity of each right in the Shari'ah's sources in a normative capacity as values in their own right, rather than having them viewed as extensions of a particular juristic doctrine. Perhaps the three-fold classification of *maṣāliḥ* can be utilized as a basis of classifying fundamental rights and liberties along similar lines. What all of this serves to illustrate is that there is no shortage of basic Shari'ah authority in support of these rights.

There is already a legacy of experience and precedent in constitution making available in contemporary Muslim countries. This legacy is often predicated on the binary division of rights and liberties into constitutional and ordinary. But since constitutionalism as a movement is a western phenomenon that was closely imitated by postcolonial and newly emerging Muslim states, the experience tends to lack any attempt to forge a link with the indigenous Islamic heritage. The foreign origin of this experience does not necessarily proscribe or make the endeavor reprehensible, but it does imperil the task of coherence and integration. In fact, retaining or formulating many such elements in light of the Shari'ah's guidelines is distinctly desirable, for this would develop harmony and coherence in the legal and cultural experiences of contemporary Muslims.

Conclusion

It seems that many aspects of *ḥaqq* in Islamic law were developed in the absence of a clearly articulated definition. However, it is also clear that Muslim jurists articulated, at an early stage, a definition for *ḥukm shar'ī* (Shari'ah ruling) and all of its various components.[13] This essay has shown the ulema's tendency to subsume *ḥaqq* under the wider concept of *ḥukm*. The availability of a clear definition for *ḥukm* may have retarded progress on one for *ḥaqq* and may also have encouraged the tendency to subsume one under the other. *Ḥukm* also exhibits a closer affinity with obligation (*wājib*) than does *ḥaqq*. Right and duty are, of course, correlated even if they are not mirror images of each other. Although rights and duties are not always correlative, in that one can exist without the other, noncorrelative rights and duties are nevertheless specific exceptions of marginal, rather than central, significance.[14]

The analysis presented in this paper supports the relative prominence of *ḥukm* and *wājib* over *ḥaqq* in Islamic law. But this has never meant that the latter could be relegated into insignificance, nor has it detracted the ulema from paying exclusive attention to developing its various aspects: causes (*asbāb*), varieties and classifications, its uses and abuses

---

[13]These are the *Ḥākim* (the Lawgiver), *maḥkūm fīh* (subject matter of *ḥukm*), *maḥkūm 'alayh* (the party of incidence), and the *ḥukm* itself.

[14]Although the correlative nature of rights and duties is a much debated subject in jurisprudential literature, it seems that a duty can exist independently of a right. This might be true of Islamic law, for many obligatory duties that can be classified as *'ibādāt* are not necessarily predicated on a particular right. Similarly, duties related to criminal law, whether Islamic or western, are imposed on members of society, none of whom have concomitant rights (Dias 1976). On the other hand, a right seems to be more dependent on a duty, thus making duty appear as the stronger or more independent unit of this duo.

(*isti'māl al ḥaqq* and *ta'assuf fī isti'māl al ḥaqq*), fulfillment of right (*istīfā' al ḥaqq*) and termination of right (*inqiḍā' al ḥaqq*).[15] I also developed a certain view on the relationship of *ḥaqq* with *'adl* under the unitarian influence of *tawḥīd* and have, in the same light, discussed the recognition of fundamental rights as a separate category in Islamic law.

Western jurists are divided on the relative significance of right versus duty. Hohfeld (1964) was not the first to recognize "right" as a very ambiguous term, but he elaborated upon this theme to a much greater extent than did his predecessors. Right is an advantage and, as such, a general concept when compared to duty, which is specific. A person having a duty must be told specifically, not in general terms, what he/she may or may not do. But a right to life and property, statable as it is, is very general and may be correlated with a long list of duties. To correlate a right to a specific duty is therefore not always self-evident, as this relationship, certain as it is, can be either clear and immediate or diluted and remote.

With this in the background, western thinkers have advanced two theories, one that advocates the relative primacy of rights as the origin of duties and another that is known as the redundancy of rights: "Whether we speak of rights or duties is at the end of the day merely a matter of perspective or style since nothing extra is conveyed by using instead of duty the language of right."[16] "Being a right against" can be seen as "having a duty towards" without in any material sense detracting from or denying the substance or the two-party relationship of either. It is perhaps due to the corresponding relationship, or correlativity, of right and duty that recognition of one requires a corresponding recognition of the other.

References

Abū Sinnah, Aḥmad F. "Naẓarīyat al Ḥaqq." In *Al Fiqh al Islāmī Asās al Tashrī'*, edited by Muḥammad T. 'Uwayḍah. Cairo: Maṭābi' al Ahrām al Tijārīyah, 1391/1971.

Abū Zahrah, Muḥammad. *Tārīkh al Madhāhib al Islāmīyah*. Cairo: Dār al Fikr al 'Arabī, 1977.

Al 'Āmidī, Sayf al Dīn. *Al Iḥkām fī Uṣūl al Aḥkām*. Vol. 3., 2d ed., edited by 'Abd al Razzāq 'Afīfī. Beirut: al Maktab al Islāmī, 1402/1982.

---

[15]For details, see al Sanhūrī (1954): I, 35 ff; Abū Sinnah (1971): n. 7, at 175 ff; Mūsā (1954): n.14 at 211 ff; and al Zarqā (1967): n.8 at III, 15 ff.

[16]For details, see Stoljar (1984).

Azzam, Salem, ed. *Universal Islamic Declaration of Human Rights*. London: Islamic Council of Europe, 1981.

Al Bahīy, Muḥammad. *Al Islām fī Ḥall Mashākil al Mujtama'āt al Islāmīyah al Mu'āṣirah*. Beirut: Dār al Fikr, 1393/1973.

Barendt, Eric. *Freedom of Speech*. Oxford: Oxford University Press, 1985.

Bridge, J. W. et al. *Fundamental Rights*. London: Sweet & Maxwell, 1973.

Calverley, E. E. "Ḥakk" In *The Encyclopedia of Islam*. Vol. 3. New Edition. Leiden: E. J. Brill, 1971.

Curzon, L. B. *Jurisprudence*. Plymouth, U.K.: Macdonald & Evans, 1979.

al Darīnī, Fatḥī. *Al Ḥaqq wa Madā Sulṭān al Dawlah*. 3d ed. Beirut: Mu'assasat al Risālah, 1404/1984.

Dias, R. W. *Jurisprudence*. 4th ed. London: Butterworths, 1976.

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. 10th ed. London: Macmillan, 1964.

Enayat, Hamid. *Modern Islamic Political Thought*. London: Macmillan, 1982.

Gibb, H. A. R. "Constitutional Organisation." In *Law in the Middle East*, edited by M. Khadduri and H. Liebesney. Washington, DC: The Middle East Institute, 1955.

Ḥammād, Aḥmad J. *Ḥurrīyat al Ra'y fī al Maydān al Siyāsī*. Cairo: Dār al Wafā', 1987.

Ḥammād, Aḥmad Z. "Ghazālī's Juristic Treatment of the Sharī'ah Rules in al Mustaṣfā." *The American Journal of Islamic Social Sciences* 4, no. 2 (December 1987): 158-77.

Hohfeld, Wesley. *Fundamental Legal Conceptions*. New Haven: 1964.

Ibn 'Ābidīn, Muḥammad A. *Ḥāshīyat Radd al Muḥtār 'alā Durr al Mukhtār*. Vol. 4, 2d ed. Cairo: Muṣṭafā al Bābī al Ḥalabī, 1386/1966.

Ibn al Qayyim. *I'lām al Muwaqqi'īn*, vol. 1, edited by Muḥammad M. al-Damashqī. Cairo: Idārat al Ṭibā'ah al Munīrīyah, n.d.

Ibn Nujaym, Zayn al 'Ābidīn. *Al Baḥr al Rā'iq Sharḥ Kanz al Daqā'iq*. Vol. 18. Cairo: al Maṭba'ah al 'Ilmīyah, 1311/1894.

'Imārah, Muḥammad. *Al Islām wa Ḥuqūq al Insān: Ḍarūrāt lā Ḥuqūq*. Cairo: Dār al Shurūq, 1409/1989.

Kamali, M. H. "Have We Neglected the Shari'ah Law Doctrine of Maslahah?" *Islamic Studies* 27 (1988): 287-304.

-----. *Principles of Islamic Jurisprudence*. 2d ed. Cambridge, U.K: The Islamic Texts Society, 1991.

al Khafīf, 'Alī. *Al Ḥaqq wa al Dhimmah*. Cairo: Maktabat Wahbah, 1945.

Lane, Edward W. *Arabic-English Lexicon.* Book 1, part 2. London: Williams and Northgate, 1865 (reissued in 1978 by Islamic Book Centre, Islamabad, Pakistan).

Langarudi, Muhammad J. *Maktabha-e Huquqi dar Huquq-e Islam.* Tehran: Kitabkhana-e Ganj-e Danish, 1370/1991.

Luca, C. "Discrimination in the Arab Middle East." In *Case Studies on Human Rights and Fundamental Freedoms.* Vol. 1, edited by W. A. Veenhoven. The Hague: Martinus Nijhoff, 1975.

Al Mawsū'ah al Fiqhīyah. Vol. 18. Kuwait: Wizārat al Awqāf wa al Shu'ūn al Islāmīyah, 1409/1989.

Munir, Muhammad. *Constitution of the Islamic Republic of Pakistan 1973: A Commentary.* Lahore: Law Publishing Company, 1975.

Murphy, Jeffrie G. *An Introduction to Jurisprudence.* Tofowa, NJ: Rowman and Allanheld, 1984.

Mūsā, Muḥammad Y. *Al Fiqh al Islāmī.* Cairo: Dār al Kutub al Ḥadīthah, 1374/1954.

Panikkar, Raimundo. "Is the Notion of Human Rights a Western Concept?" *Interculture* 17, no. 1 (March 1982).

Al Qarāfī, Shihāb al Dīn. *Kitāb al Furūq.* Vol. 1. Cairo: Dār al Kutub al 'Arabīyah, n.d.

Quṭb, Sayyid. *Al 'Adālah al Ijtimā'īyah fī al Islām.* 4th ed. Cairo: 'Īsā al Bābī, 1373/1954.

Al Ṣābūnī, 'Abd al Raḥman. *Muḥāḍarāt fī al Sharī'ah al Islāmīyah.* n.p., 1392/1972.

Al Sanhūrī, 'Abd al Razzāq. *Maṣādir al Ḥaqq fī al Fiqh al Islāmī.* Cairo: Ma'had li al Dirāsāt al 'Arabīyah al 'Ālīyah, 1954.

Ṣadr al Sharī'ah ('Ubayd Allāh al Bukhārī). *Al Tawḍīh.* Vol. 2. Cairo: Maṭba'at Dār al Kutub al 'Arabīyah al Kubrā, 1327/1909.

Schacht, Joseph. "Law and Justice." In *The Cambridge History of Islam,* edited by P. M. Holt. Cambridge, UK: Cambridge University Press, 1970.

Al Shāṭibī, Abū Isḥāq I. *Al Muwāfaqāt fī Uṣūl al Sharī'ah,* edited by 'Abd Allāh Dirāz. Vol. 2. Cairo: Al Maṭba'ah al Raḥmānīyah, n.d.

Al Sibā'ī, Muṣṭafa. *Ishtirākīyat al Islām.* 2d ed. Damascus: Dār al Qawmīyah, 1379/1960.

Siegman, Henry. "The State and Individual in Sunni Islam." *The Muslim World* 54 (1964).

Stoljar, Samuel J. *An Analysis of Rights,* Wiltshire, UK: Macmillan, 1984.

al Zarqā, Muṣṭafā A. *Al Madkhal al Fiqhī al 'Āmm.* Vol. 3. Damascus: Dār al Fikr, 1967.

Zullah, Muhammad A. "The Application of Islamic law in Pakistan." Address by the chief justice of Pakistan, 6 September 1991.